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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 325

MORLEY CONSTRUCTION COMPANY, A CORPORATION, AND MERCHANTS BANK OF KANSAS CITY, MISSOURI, A CORPORATION, PETITIONERS,

VS.

MARYLAND CASUALTY COMPANY, A CORPORATION, RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

JOHN C. GROVER,
Attorney for Respondent.

SPENCER F. HARRIS,
PAUL G. KOONTZ,
Of Counsel.

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A.

Summary Statement of Matter Involved.

An amplification of portions of the summary statement contained in the petition for writ of certiorari filed by the petitioners will clarify the issues involved and the decisions which have been rendered in this cause. In

such statement the only reference to the bill of complaint is the statement that it was alleged by the complainant that the construction company intended to use the proceeds from the voucher involved for purposes other than paying the labor and material claims, and that the construction company intended to conceal and fraudulently convey the same. The complaint alleges that at the time of the execution of the agreement, plaintiff's Exhibit 3 (R. 57), the Morley Construction Company notified the surety company that it was involved in financial difficulties as well as disputes of laborers, and that it was unable to proceed with the construction of the building unless the plaintiff would furnish to defendant, Morley Construction Company, advances or money for the purpose of completing said work (R. 3); that it further alleges that at the time of the filing of the bill there were outstanding unpaid accounts for labor and material in the amount of $107,000.00, which it was the obligation of the construction company to pay out of the funds derived from the contract, being the warrant for $59,780.22, which said amount the complaint alleges was improperly received by the construction company and converted to its own use (R. 6). The petition further alleges that the defendant, Morley Construction Company, was involved in other financial complications and was wholly insolvent, and the prayer was that this particular fund, representing the last payment on the contract price, should be impressed with a lien and trust to the end that it should be applied in payment of bills for labor and material and to accomplish that end, prayed either that specific performance be had of the agree-

ment provided for its disbursement for those purposes, or that the Court grant the same relief by way of exoneration by directing and ordering the construction company to use such fund for such purposes (R.8).

The motion to dismiss the proceeding, which was filed by petitioner in the District Court was by the Court overruled before the trial of the case.

In referring to plaintiff's reply (page 5, petitioner's application) in which the statement was made that the respondent in the reply stated "that the sole purpose of plaintiff's complaint is to require the defendants to deposit said money and to require its disbursement in accordance with said alleged contract." Without the full reply before the Court, the impression might be given that the only relief sought was specific performance. The portion quoted is contained in paragraph 10 of the reply of respondent (R. 33) and is in answer only to paragraph 14 of petitioners' answer (R. 19). The allegation in such paragraph 14 of petitioners' answer in the District Court, was the allegation that it was none of the business of the respondent from what source petitioners derived the money from which the outstanding bills were to be paid, and therein assert that the wrongful action of the plaintiff (respondent) in preventing the Treasurer of the United States from paying the said check to the defendant, Morley Construction Company, rendered the construction company powerless to use such money for any purpose, and powerless to carry out the alleged contract to deposit money in the M. & T. Trust Company as provided in the escrow agreement. The reply, as contained in paragraph 10 thereof (R. 33), was in

answer to this paragraph 14 of the answer, and sets out in answer to the allegation that the plaintiff, respondent, was seeking to and was preventing the application of such proceeds for the payment of labor and material bills. Such paragraph 10 follows (R. 33):

> "10. Plaintiff for reply to paragraph 14 of said answer denies that the plaintiff was guilty of any wrongful action in preventing the Treasurer of the United States paying the said check to the said defendant, Morley Construction Company, and denies that plaintiff has prevented the defendant, Morley Construction Company, from receiving said money and has rendered said defendants, and each of them, powerless to use said money for any purpose, and powerless to enable said defendant, Morley Construction Company, to carry out its alleged contract to deposit said money with M. & T. Trust Company, but on the contrary, states that the sole purpose of plaintiff's complaint is to require the defendants to deposit said money and to require its disbursement in accordance with said alleged contract, and the plaintiff at all times since said action was and is now anxious and willing that the said money be deposited and disbursed in accordance with said contract, Exhibit 'A.'"

On page 5 of the petitioners' application, it is stated that the testimony developed in the trial that the assets of the Morley Construction Company exceeded its obligations by $23,598.84. In connection with the testimony of Mr. Morley, president of the petitioner, the plaintiff offered in evidence two lists of the then outstanding unpaid bills for labor and material. The first list totaled $90,771.34 (R. 55). The additional list, being plaintiff's Exhibit 2, showed an additional amount of $989.79 (R. 57), making a total of $99,861.13. In addition to these amounts, the

testimony of Mr. Morley showed that the company had borrowed from a bank the sum of $5,000.00; that the company was indebted to the Maryland Casualty Company by reason of advancements in the sum of $10,700.00; that it owed to the Maryland Casualty Company for premiums approximately $4100.00 and to the Ithica Trust Company the sum of $3,000.00, making an additional amount of $22,800.00 owing by the construction company (R. 56). This added to the total represented by the two lists, according to the testimony of the president, Morley, was $122,661.13. At the trial there was also introduced a statement of unpaid bills for labor and material, which was furnished by the construction company to the surety company listing amounts due to various labor and material claimants totaling $107,666.23. This list did not include the additional items of $22,800.00 hereinbefore recited, and which added to the list totaling $107,666.23 (being plaintiff's Exhibit 6, R. 85) made a total of outstanding indebtedness previous to the bringing of this suit, according to petitioners' own testimony, of $130,466.23. The total amount claimed by petitioners as assets, including the two large unliquidated claims against the New Amsterdam Casualty Company and its principal, and against Moody L. Rupp, totaled $42,791.00. The only actual assets or liquid assets of the company (petitioner) was the sum of $7,666.66 remaining on deposit in the account at Buffalo and the warrant for the balance of the contract price of $59,780.22. Applying this amount in liquidation of the claims as disclosed by the two exhibits 1 and 2, of the plaintiff, that is, subtracting it from the total indebtedness of $122,661.32, there remained unpaid claims of

$55,901.13 for the payment of which the company (petitioner) claims to have had assets including the two unliquidated claims, which, if collected and applied, failed to amount to sufficient to pay the admitted claims by the sum of $12,986.13.

Adopting the figures as represented by the list of outstanding claims given to the surety company by the construction company before the trial of the case, which totaled the sum of $130,466.23, and applying to the payment of these the money in the bank and the money represented by the warrant for the unpaid contract price, $66,760.00, in reduction of the outstanding claims, it still left outstanding the sum of $63,706.23, and assuming the collection in full of the total outstanding claims of the construction company, including the large unliquidated claims amounting to $42,791.23 in reduction of the remaining unpaid claims, it still left outstanding claims to the amount of $20,915.00 for which there were no assets or means of payment, instead of a surplus of assets in the amount of $23,598.84 as set out on page 5 of the application.

In the reference to the findings of the District Court shown on pages 6 and 7 of the petitioners' application, are set out excerpts. The full paragraph first shown reads as follows:

> "While it was not the intention of the construction company, nor its officers, when the bill was filed, to use the proceeds of the warrant referred to in finding of fact No. 4 for any other purpose than the payment of labor and material claims upon the Batavia contract, the casualty company had reason to apprehend that such was their intention."

In this connection, and apparently overlooked by the trial court, was the statement of counsel as to what the construction company had in mind, shown on page 108 of the record as follows:

> "Mr. Ellison: However, Your Honor, since he has stated what they are willing to do, we offer to deposit this money in the First National Bank here, or any other bank, together with a list of all bills payable on this job, with instructions on the bank that no checks should be paid except in the reduction or settlement of one of those bills, and the further provision that any expenses of prosecuting these claims against defaulting contractors or the government should also be paid from this fund."

In this connection the Court found (R. 116) that on or about April 28, 1933, the construction company became involved in financial difficulties and was unable to proceed with its contract without pecuniary aid from the casualty company, and that thereupon the contract of April 28, 1933 (R. 57) was entered into, by which, as construed by the Court, it was intended and understood by the parties to the agreement, and it was a part of that agreement that the monies received from the United States should be so deposited and should include the final payment under the contract made by the United States and the construction company, as well as all other payments under the contract made by the United States after April 28, 1933 (R. 117). The Court further found (R. 117) (paragraph 4):

> "By direction of the construction company and notwithstanding the agreement referred to in Finding of Fact No. 2, the United States sent its warrant on the Treasury for $59,780.22, not to the M. & T. Trust

Company, Buffalo, as other warrants had been sent after an agreement was entered into, but to the construction company at Kansas City, Missouri."

The Court further found (R. 118):

> "At the time the agreement referred to in Finding of Fact No. 2 was entered into between the construction company and the casualty company, the construction company was insolvent, and it was insolvent when the bill in this case was filed. 'When the bill in this case was filed, there were claims against the construction company for labor and materials furnished on its Batavia contract in an amount exceeding $100,000.00, which were due and payable.'"

The District Court in its opinion found (R. 119):

> "But the plaintiff is entitled to exoneration by the defendant. When its bill was filed, the claims against defendant of those who had furnished labor and materials on the Batavia contract in the amount of more than $100,000.00 had matured and were due and payable. Immediately they became due, the plaintiff's liability arose. Contemporaneously with the beginning of liability, its right of exoneration came into being. 'No principle in equity is more familiar or more firmly established than that a surety after a debt for which he is liable has become due, without paying or being called on to pay, it may file a bill in equity in the nature of a bill *quia timet* to compel the principal debtor to exonerate him from liability.'"

The decree of the Court (R. 35) gave to the defendant relief as prayed, both under the prayer for specific performance and under the prayer for exoneration, in that it ordered a decree that this particular money, which under the contract of April 28, 1933, was to be deposited in the M. & T. Trust Company for the payment of labor and material bills, should be deposited

in some bank as a special trust fund for the payment of all bills for labor and material used on the United State Veterans Hospital in Batavia, New York, electing to place the right under the doctrine of exoneration rather than decreeing a specific performance for the reason as stated in the opinion, that the plaintiff itself had not discharged all its obligations under that agreement (R. 118). The agreement of April 28, 1933, provided (R. 58):

> "First: The Morley Construction Company hereby agrees to deposit in the M. & T. Trust Company in the City of Buffalo, New York, the sum of five thousand ($5,000.00) dollars and to deposit from time to time certain other sums of money to be used toward the completion of said contract . . ."

It also provided:

> "Fifth: The Maryland Casualty Company further agrees to place on deposit in said account to the credit of the Morley Construction Company moneys to pay off plasterers' claims which have not been paid by D. Giamberardino & Sons who employed said plasterers and also sufficient money to complete the Giamberardino plastering contract if the amount to be paid to complete said contract is deemed reasonable and satisfactory to the Maryland Casualty Company."

The Morley Construction Company did not as in said agreement provided "deposit from time to time certain other sums of money to be used toward the completion of said contract." The Maryland Casualty Company did not deposit in said fund "sufficient money to complete the Giamberardino plastering contract." No point was made of this failure on the part of either, and these requirements on the part of each were apparently mutually abandoned as will be shown by the reference in the opinion of the Circuit Court of Appeals.

Upon appeal, the case was affirmed and the same order given in effect as that which had been given in the original decree of the District Court. The Circuit Court of Appeals in its discussion of the right of exoneration under which the relief was given by the District Court, discusses the question as to whether or not the time had arrived for the application of the doctrine of exoneration and states (page 9 of its opinion): "We are in grave doubt whether exoneration can properly be granted." The Court fully goes into the question of specific performance and referring to the opinion of the lower court states (page 5 of the opinion):

> "As conclusions of law the Court found:
>
> " 'Plaintiff is not entitled to a decree of specific performance of the agreement referred to in finding of fact No. 2. . . .'
>
> "We cannot agree with this conclusion of the trial court.
>
> "Acquiescence by defendant in a modification of the contract Exhibit 'A,' which modification was, thereafter, carried out, deprives the conduct of the plaintiff of any taint of inequity. *Becker* v. *Becker*, 250 Ill. 117, 95 N. E. 70; *Langley* v. *Devlin*, 95 Wash. 171, 163 Pac. 395.
>
> "Such acquiescence, we think, was shown by the evidence in the case at bar."

The Court of Appeals thereupon affirmed the decision with directions to the District Court to enter up a decree of specific performance, stating, after discussing the question of exoneration:

> "It is conceded that the six months' period had not expired in the case at bar.
>
> "For this reason, we have preferred not to place the relief to be granted on the basis of exoneration, but rather on the basis of specific performance of the agreement, Exhibit 'A.' "

RESPONSE TO PETITIONERS' REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

I.

The assets impounded by the decree of the District Court were funds derived from the contract covered by respondent's bond, and under the agreement with the parties evidenced by the contract of April 28, 1933, were to be used only for the payment of labor and material bills, and were funds out of which respondent was ultimately entitled to be exonerated. There was nothing in the proceeding to prevent the petitioner, Morley Construction Company, from pursuing any right it had against anyone liable to it. The time for bringing such a suit has not yet expired. The fact that it had made no move to enforce any such right up to the time of the trial of the cause, does not bespeak any great good faith in this contention. There was $7,000.00 in the escrow account which was not in anywise affected by this litigation. Petitioner, Morley Construction Company, was not under any theory entitled to take from this fund agreed to be disbursed in payment of debts for which respondent under its bond was liable, any portion for the purpose of speculating in a law suit over disputed unliquidated claims. The statement that the Morley Construction Company suffered a loss in excess of $42,000.00 is, therefore, entitled to no consideration. The truth of the matter is that the respondent, according to the figures shown by the estimates of Herbert F. Morley, will suffer a loss or be

required to pay bills which, in addition to the money already advanced by them, will exceed this amount. So that if the Morley Construction Company had any claims or counterclaims against certain of the claimants, as indicated in their testimony, the respondent would be subrogated to such rights and entitled to the proceeds of any such claims to reimburse it for the amounts which it will be obliged to pay out.

II.

There is no merit in the contention made by petitioners in Section II on page 9 of their application. They are seeking to treat the contract of April 28, 1933, as an assignment of the fund, and to invoke the provisions of Section 3477 of the Revised Statutes. The respondent had the right, irrespective of any contract, to have the proceeds from this construction contract, applied in payment of bills for labor and material performed and used on the contract, and these contracts of April 28, 1933, only reiterated and designated the method of doing this. The rights of no creditors intervened and the respondent will have to pay whatever creditors there are. So there does not arise the question as in the cases cited by petitioners, of an assignment sought to be enforced prior to the rights of other creditors, and the respondent is not seeking as an assignee to recover direct from the Government. The cases cited have no application, and the situation presented does not involve any asserted right contrary to Section 3477.

III.

In Section III on page 10 of petitioners' application, petitioners are again in another way asserting the contention set out in Section II, and what has been said under paragraph II herein equally applies to this section.

IV.

The position of the petitioners as indicated by Section IV on page 10 of the application, is that the United States Circuit Court of Appeals was without jurisdiction to affirm the decision of the District Court and to give the relief granted on different grounds.

The Court of Appeals is seeking to do justice, and in so doing was exercising the right it unquestionably had in trying the case *de novo,* and in arriving at the result it thought was just, and if it felt that the reasons given by the District Court were not the proper reasons to support the result, it had the right to affirm the judgment of the District Court for reasons other than those given by the judge of that Court.

Mound City v. *Castleman* 187 Fed. 921, l. c. 923; affirmed *Mound City* v. *Castleman,* 235 U. S. 689.
Ramsay v. *Crevlin,* 254 Fed. 813.
4 C. J., p. 726, para. 2647.
Dean v. *Davis,* 212 Fed. 88, l. c. 89.
Shore v. *United States,* 282 Fed. 857, l. c. 860.
Commissioner v. *Bryson,* 79 Fed. (2) 397.
Presidio Mining Company v. *Overton,* 270 Fed. 388.

The cases cited on page 11 of petitioners' application under Section IV are not in point, having to do only

with the rights under cross errors and cross appeals, and not with the right of the appellate court to try the case *de novo* and to determine therefrom the rights of the parties.

V.

Under Section V on page 11 of petitioners' application, is raised again the same point as is raised in Section IV, and what is here said under Section IV applies equally to this Section V.

VI.

There was no evidence that the Morley Construction Company repeatedly requested the Maryland Casualty Company to perform its contract and place sufficient money in the joint account to complete the plastering contract. The Court of Appeals commented on the testimony on this point and quoted it in its entirety in its opinion. The evidence is embodied in the testimony of Herbert F. Morley (R. 76-77) and James Kelly (R. 88). The sum and substance of the testimony was that when the first monthly estimate became due, Morley asked Kelly, representing the surety company, for money to pay the first month's work by the Hudson Plastering Company, and was advised to pay it out of the joint account. Nothing was said by Kelly as to whether or not the surety company would carry out its contract. When the next month's payment came due, Morley requested that money be advanced to meet it, and Kelly suggested that it be paid out of the joint account, and Morley did

pay it out of the joint account. A few days later when Morley discussed the matter with Kelly, he, Kelly, made the remark that the Maryland Casualty Company was not going to put any more money in that account. Morley made no further demand upon Kelly for payment (R. 76-77). Kelly testified that at the time an estimate came due, he asked Morley if he was going to pay it out of the estimate and Morley did ask him to pay the Hudson claims, and he told him to pay it out of the estimate coming due (R. 88). No question ever arose afterwards concerning this obligation of the Maryland Casualty Company, and Morley Construction Company never, after signing the contract deposited money in the joint account from "time to time" for the purpose of carrying on the contract. The estimates coming in were apparently sufficient to carry on the contract, and these obligations were mutually abandoned, or by mutual consent were not insisted upon.

The Court of Appeals so found and the cases cited under this section do not hold to the contrary. These cases hold that parties to a written contract may not by parol or subsequent action add to the obligations of the contract, but do hold that the parties by parol agreement or subsequent action may waive the performance of conditions in the contract. As the Court of Appeals (p. 5), in its opinion in discussing this question of acquiescence in the modification of the contract by eliminating certain affirmative requirements, says:

> "Such acquiescence, we think, was shown by the evidence in the case at bar."

VII.

An examination of the cases cited by petitioners under Section VII on page 13 of their application, will disclose that the decision of the Court of Appeals was not in conflict with any of these cases.

VIII.

The action of respondent in tying up the proceeds of the voucher involved was not in anywise in violation of any duty imposed upon the Maryland Casualty Company as surety. It was in nowise a breach of the performance bond executed on behalf of the Morley Construction Company, and was simply an attempt to enforce the right which the surety company had to have these funds applied to the payment of bills for labor and material on the contract. It was an attempt to prevent what the Morley Construction Company afterwards admitted was its intention (R. 180), to divert part of these funds for purposes other than those for which it was agreed the funds should be used.

IX.

The reasons set out in Section IX on page 14 of petitioners' application, state no reason sufficient to support the contention. The agreement, Exhibit "A" (R. 9), was the contract entered into between the Morley Construction Company and the Maryland Casualty Company providing for the deposit of the monies from the contract in the M. & T. Trust Company. The contract,

Exhibit 3, was but a direction by both parties to the original contract addressed to the M. & T. Trust Company in which the original contract provided the funds should be deposited, as to the manner of its disbursement. There was no change or modification of any kind in the contract. After the deposit arrangements had been in existence some two months and on June 21, 1933, the name of Herbert F. Morley, President of the Morley Construction Company, was substituted in the account in the M. & T. Trust Company for that of the Morley Construction Company. This apparently was done to expedite the handling of the fund and was not in anywise a modification of the contract.

X.

Under Section X on page 14 of petitioners' application is raised the question as to the jurisdiction of the District Court in this case, the contention being that it involved property not within the jurisdiction of the Court. This is an equity action which does not directly involve any property but simply involves the right of the Court to direct the officers of the Morley Construction Company who were within the jurisdiction of the Court, to do certain things, and is a proceeding *in personam* and not *in rem*, and so long as the Court has jurisdiction of the individuals it had jurisdiction to make any order that it saw fit as affecting the individual actions or directions to these individuals. This exercise of jurisdiction is so common as to require no further comment or cita-

tion of authorities. The case cited under this section by petitioners does not anywise change this doctrine.

XI.

Under Section XI on page 15 of petitioners' application is raised for the first time the question of the failure to have the M. & T. Trust Company made a party to the suit, and the failure to make the employees Kelly and Schaus parties to the action. There is nothing in this contention as the action was designed to require the petitioner, Morley Construction Company, to perform its contract and its duty. There was no refusal or disinclination on the part of the M. & T. Trust Company, which was merely a depository, to perform any obligation imposed on it and there was no necessity or propriety which required it to be a party to the action. Employees of respondent, of course, were neither necessary nor proper parties. The respondent was in Court and through it every employee which it had. The cases cited under this section are not applicable to the situation here.

XII.

The Maryland Casualty Company was not asserting any rights to use the proceeds from the contract price in any manner that it saw fit, but was only seeking to have the Court direct the application of the funds in the manner provided for in the contract between the parties and in accordance with its right as surety on the project involved.

XIII.

The statement of petitioners in Section XIII on page 16 of the application appears to be incomplete, petitioners apparently attempting to state the proposition that this Court has the right to review this action of the Court of Appeals as a matter of discretion.

We find nothing in any of the reasons given by petitioners in their application for a writ of certiorari to justify or to impel a review of the action of the Circuit Court of Appeals. There is involved no matter of importance, nor is there involved any conflict with other decisions for which a certiorari might issue. It simply involves the attempt by petitioners to in effect appeal from the decision rendered by the United States Circuit Court of Appeals. It is a request for the Supreme Court to review the evidence and to discuss specific facts already presented to and decided by the Court of Appeals, and to prolong a litigation which has already extended beyond any reasonable time. The only purpose hoped to be accomplished by petitioners would be that the case would be sent back for a retrial because the right of exoneration was granted by the Court within six months after the completion of the contract when petitioners contend that the right to exoneration did not arise until the time arrived at which the labor and material claimants might file their suit against the surety company. The only effect would be to again try the issue which has already been tried and decided so that the Court might at a subsequent hearing grant the same relief which it had granted at the original trial. Petitioners have not seriously

contended that the right of exoneration does not exist, but in fact concede such right except for the claim that the time for its exercise had not arrived when the original suit was brought. Petitioners would gain nothing by such action except cause a postponement to respondent of its relief under the right of exoneration and could not hope under the evidence offered and which would be the same evidence in a new trial to obtain any relief of any benefit to it.

ARGUMENT.

The responses herein made to the reasons given by petitioners in their application for their prayer for the issuance of a writ of certiorari, sets out the position of the respondent and as counsel see it, plainly show why the writ should not issue and respondent desires only to supplement that as follows:

I.

In subdivision I of petitioners' argument on page 22 is presented an argument addressed to the reasons set out in paragraphs IV and V on pages 10 and 11 of the application, and attacks the right of the Circuit Court of Appeals to grant the relief which the District Court had granted for reasons other than those upon which the District Court based its granting of the relief. We think there can be no doubt as to the position of the Circuit Court of Appeals as evidenced by its decision or of its right to so decree. It was seeking to do justice and in

doing so, it was exercising the right which it unquestionably had trying this case *de novo,* and in arriving at the result which it thought was just, and if it felt that the reasons given by the District Court were not the proper reasons to support the result, it had the right unquestionably to affirm the judgment of the Court for reasons other than those given by the district judge. The decisions referred to in the argument of the petitioners have to do with a discussion of rights involved in the taking of cross appeals and in the assignment of cross errors. They do not attempt to say that the Court of Appeals could not in an equity case determine the matter anew, and to grant the relief which the Court of Appeals thought the respondent was entitled to even though in doing so the reasons given were different from those assigned by the District Court.

Judge Walter Sanborn in the Circuit Court of Appeals for the Eighth Circuit, in the case of *Mound City* v. *Castleman,* 187 Fed. 921, l. c. 923, clearly states this right in the Court of Appeals:

> "The proceedings in this suit have been many and tedious. An original bill, two supplemental bills, pleas, answers, exceptions to answers and numerous rulings in the progress of the cause have presented favorable opportunities for alleged errors that counsel for appellant has not failed in his assignment to specify, and to take every possible advantage of. But an appeal in a suit in equity invokes a trial of the case *de novo* by the appellate court and demands, where that is possible, a just and final decision. When, therefore, the record clearly shows that the decision below was right, and that alleged errors, if

they existed, could not affect adversely to the appellant, the final result, the decree must be affirmed."

This case was approved by the Supreme Court in 235 U. S. 689.

The same holding appears in the case of *Ramsay* v. *Crevlin,* 54 Fed. 813, l. c. 821, decided also by Judge Walter Sanborn.

The rule is generally stated in 4 Corpus Juris, page 726, para. 2647, as follows:

> "Under the old chancery practice, and usually under the codes of procedure, suits in equity are tried *de novo* on appeal upon the entire record and evidence. The appellate court itself will sift the whole evidence and determine what the finding of the trial court should have been upon such evidence as was competent and proper. The court below and the appellate court are judges of both law and fact."

Under this quotation is cited a very large number of cases and it will serve no useful purpose to burden the Court with comment on any of them.

To the same effect is the case of *Dean* v. *Davis,* 212 Fed. 88, l. c. 89, to support which is cited the case of *Erwin* v. *Lowry,* 48 U. S. 172, wherein the Court says:

> "This court must affirm the judgment of the trial court if it finds in the record any reason which it considers sound enough, even though the district judge may have rejected that reason and rested his decree on some other ground. *Erwin* v. *Lowry,* 48 U. S. (7 How.) 172, 12 L. Ed. 665. We are free, therefore, to consider whether the deed to Dean should be annulled as an unlawful preference under Section

60b, although the District Court held that it was not such a preference."

To the same effect are the cases of:

Unkle v. *Wills*, 281 Fed. 29, l. c. 34.
Shore v. *United States*, 282 Fed. 857, l. c. 860.
Commissioner of Internal Revenue v. *Bryson*, 79 Fed. (2d) 397.
Presidio Mining Company v. *Overton*, 270 Fed. 338, l. c. 389.
American Rotary Valve Company v. *Moorehead*, 226 Fed. 202.
Westermann v. *Dispatch Printing Company*, 233 Fed. 609.

Petitioners take the rather peculiar position that the Circuit Court of Appeals could not consider any right respondent might have had to a specific performance of the contract of April 28 1933, because the respondent did not appeal from the judgment in the District Court.

Respondent had nothing from which to appeal except a judgment in its own favor giving to it the relief it sought. An appeal is taken from the judgment of the Court and not from the reasons of the Court in arriving at the judgment and respondent in this case had no cause for complaint on the judgment that was rendered. If the judgment is right although based upon incorrect conclusions drawn from the evidence or upon improper reasoning of the Court in its application of the law, in an equity proceeding the Court of Appeals could correct the judgment of the trial court on what the Court of Appeals conceived to be the correct application of the law in the case on the facts presented even though such conclusions might differ from conclusions drawn by the District Court.

II.

We have discussed this point under Section VI of respondent's response to the similarly numbered section of petitioners' reasons for the certiorari. The Court of Appeals found that the District Judge had taken a mistaken view with reference to the performance or failure of performance of respondent in connection with the contract of April 28 1933. It was the finding of the Court of Appeals that both parties had acquiesced in the abandonment of the enforcement of the two clauses in the contract, one of which required the Morley Construction Company to deposit money from time to time in the escrow account, and the other of which required the respondent to deposit in such account monies sufficient to complete the plastering contract. As stated in our response to this reason, it apparently was unnecessary to do this as the estimates coming in for the work were sufficient to carry on the contract. The Court of Appeals cites two cases, to which referense is made by petitioners in Section VI on page 12 of their application. Petitioners have stated that these cases do not support the Court of Appeals. We take the liberty of quoting from the case of *Becker* v. *Becker,* 95 N. E. 68, l. c. 73 (Ill.), where the Court, after discussing the question and referring to a number of authorities, states:

> "The rule announced in these cases and others in line with them, is too firmly established by the decisions of this Court to be seriously controverted at this time. Conceding the full force of the rule above announced, there is a well-defined distinction between the parol contract which adds to or modifies

the terms of an executory written contract under seal, and a parol agreement made by the parties by which some of the covenants in such written contract are waived by the party for whose benefit such covenants were inserted. Where a party to such written instrument by some affirmative action on his part, induces the opposite party to believe that the strict performance of a covenant will not be insisted upon, or that the same be waived, and such other party fails to perform the covenant through the influence or request of the covenantee, in equity such party shall be estopped to insist that the written contract is no longer obligatory upon him because of the non-performance of such covenant. A waiver of a covenant by a party for whose benefit it is inserted into a written instrument, may be made by a parol agreement, and such waiver is held not to be a modification or change in the terms of the original agreement."

This simply means that where there are obligations on either party to a contract or on both parties to a contract, which the parties do not insist on being performed, and by their actions acquiesce in the elimination of such obligations, then such conduct is not a change in the contract or an addition to it, but simply a mutual arrangement which excuses or waives the performance of the contract. See also *Langley* v. *Devlin*, 95 Wash. 171, 163 Pac. 395.

We have heretofore discussed this testimony and we think there is no question but that the evidence here set out justified the Court of Appeals in stating: "Such acquiescence, we think, was shown by the evidence in the case at bar."

III.

The discussion of the question of the maxim that he who seeks equity must do equity and that he who seeks equity must come with clean hands, we think, is outside the question presented here. The matter was thoroughly briefed and thoroughly argued in the Court of Appeals, and it so clearly appears that there was no such unconscionable conduct on the part of the respondent as is required to invoke the two maxims. The whole conduct is embodied in the testimony of Herbert F. Morley and James Kelly, which has heretofore been referred to in this brief, and clearly shows no such conduct, and the Court of Appeals by the decision so found.

IV.

In Section IV on page 34 of petitioners' application and brief, it is stated that Exhibit "A," sought to be enforced, was not the real agreement between the parties. We have heretofore discussed these contracts in Section IX of responses to the reasons assigned by petitioners for the granting of the writ. It is only necessary to reiterate here that Exhibit "A" (R. 9), was the contract that was entered into between the parties, and was the contract which required the money to be deposited in the M. & T. Trust Company. Exhibit 3 (R. 73), was executed on the same day, solely for the purpose of making a joint direction to the depository, the M. & T. Trust Company, of the manner in which the account created under Exhibit "A," was to be disbursed and the substitution of a nominal depositor was not in anywise a modification or change in the contract.

V.

In Section V, page 35 of petitioners' argument, is again presented the question discussed in Sections II and III of respondent's reasons relied on for the allowance of the writ incorporated on pages 9 and 10 of respondent's application and brief. In the corresponding numbered section of respondent's response to the petitioners' reasons for the allowance of the certiorari, a sufficient answer to this argument is made. As there stated, there was involved no outstanding or conflicting interests. No rights of creditors had intervened and there was no question of the distribution as in bankruptcy or insolvency of the fund. The surety company was responsible for the debts and was seeking to apply the funds not to its own debt, but to the very debts of the very creditors who, if anyone, might have complained of this instrument, had it been an assignment. It clearly, however, was not an assignment nor any attempt to assign or enforce any rights against the United States Government by reason of purported assignment.

VI.

In Section VI on page 38 of petitioners' brief, is again raised the question in Section II on page 26 of the argument of petitioners' brief and previously discussed in paragraphs IV and V on pages 10 and 11 of petitioners' application in the discussion of the reasons relied on for the allowance of the writ. Further discussion of this question would appear to be unnecessary.

VII.

Section VII of petitioners' argument shown on page 39 of the brief, again discusses the questions set out in Sections II and III of the reasons relied on by petitioners

for allowance of the writ, and shown on pages 9 and 10, and again discussed in Section V on page 35 of petitioners' application. The cases in this section discussed were fully presented and discussed before the Court of Appeals, and an examination of them will disclose that they are in nowise applicable to the facts here. The respondent was merely attempting as heretofore stated to enforce a right which it not only had under the specific agreement with the Morley Construction Company to use these funds in the payment for labor and material, but also which it had as surety to be exonerated from its liability under the bond from any funds growing out of the contract. While the surety company was itself entitled to money which it advanced, that question was of no importance in the case as there were debts for labor and material in the performance of the contract which far exceeded the amount of the funds, together with all other available funds of the Morley Construction Company, and hence, there could be no application of the funds except for the purpose of paying the outstanding debts against the Morley Construction Company on this particular contract.

Conclusion.

It is, therefore, respectfully submitted that the petitioners have shown no reason for a review of this case by this Court, and have shown no facts or condition which would justify this Court in issuing the writ of certiorari prayed for.

Respectfully submitted,

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